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10 UNITED STATES DISTRICT COURT  
11 WESTERN DISTRICT OF WASHINGTON  
12 AT TACOMA

13 CALVIN MALONE,

14 Plaintiff,

15 v.

16 MAGGIE MILLER-STOUT *et al.*,

17 Defendants,

Case No. C08-5375BHS

REPORT AND  
RECOMMENDATION

18 **NOTED FOR:**  
19 August 22, 2008  
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21 This 42 U.S.C. § 1983 Civil Rights action has been referred to the undersigned Magistrate Judge  
22 pursuant to Title 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B) and Local Magistrates' Rules MJR 1, MJR 3, and  
23 MJR 4. The court ordered plaintiff to file an amended complaint (Dkt # 5). Plaintiff then filed a request to  
24 voluntarily dismiss this action (Dkt # 6).

25 Fed. R. Civ. P. 41 (a)(1) allows a plaintiff to simply dismiss an action prior to service or a responsive  
26 pleading being filed. **Dismissal without prejudice** is appropriate. The only remaining issue is payment of the  
27 filing fee. Mr. Malone seems to believe he will not be charged the filing fee if the case is withdrawn (Dkt. # 6).  
28 Mr. Malone filed this action. He was granted *in forma pauper* status pursuant to 28 U.S.C. 1915. Under the

1 terms of the Prison Litigation Reform Act he is responsible for repayment of the \$350 Dollar filing fee, even  
2 where his case is dismissed. The court is not aware of any authority for the proposition that the fee is not  
3 collected on cases where the plaintiff voluntarily dismisses the action prior to service.

4 The court recommends this action be **DISMISSED WITHOUT PREJUDICE**. Plaintiff is still  
5 responsible for the filing fee. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of  
6 Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections.  
7 *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes  
8 of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b),  
9 the clerk is directed to set the matter for consideration on **August 22, 2008**, as noted in the caption.

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11 DATED this 22 day of July, 2008.

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13 /S/ J. Kelley Arnold  
14 J. Kelley Arnold  
United States Magistrate Judge  
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